**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 15 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Nebraska Service Center. The petitioner appealed to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The petitioner filed a motion to reopen and a motion to reconsider the AAO decision. The motion will be granted, and the previous decision of the AAO, dated February 1, 2013, will be affirmed.

The petitioner describes itself as a company. It seeks to permanently employ the beneficiary in the United States as an Industrial Engineer/Quantitative Analyst. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The director's August 7, 2012 decision denying the petition concluded that the petition cannot be approved because the labor certification does not require a member of the professions holding an advanced degree.

On appeal, in a decision dated February 1, 2013, the AAO dismissed the appeal, concluding that the job offer portion of the underlying labor certification did not require a professional holding an advanced degree, and thus, did not support the petition, which sought classification under that category.

On March 6, 2013, the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3).

The record shows that the motion to reopen is properly filed and timely. The motion provides new facts and is supported by documentary evidence. The motion to reopen is granted. However, as set forth below, following consideration, the petition remains denied and the AAO's decision of February 1, 2013 is affirmed. The remaining procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the AAO's previous decision, the issue in this case is whether the offered position requires a professional holding an advanced degree, thereby, qualifying for classification under the category for advanced degree professionals pursuant to section 203(b)(2) of the Act.

The AAO conducts appellate review on a *de novo* basis.[1] The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.[3]

**The Roles of the DOL and USCIS in the Immigrant Visa Process**

At the outset, it is important in this case to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority

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[1] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g.*, *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[2] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[3] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

> to make the two determinations listed in section 212(a)(14).[4] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

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[4] Based on revisions to the Act, the current citation is section 212(a)(5)(A) of the Act.

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

**Eligibility for the Classification Sought**

In the instant case, the petitioner requests classification of the beneficiary as a member of the professions holding an advanced degree pursuant to section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2). The AAO will first consider whether the petition may be approved under this classification.

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of

the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Pursuant to 8 C.F.R. § 204.5(k)(i), "[t]he job offer portion of an individual labor certification . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability."

In summary, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Specifically, for the offered position, the petitioner must establish that the labor certification requires no less than a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification. Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the

labor certification requirements. *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

H.4. Education: Master's Degree in Industrial Engineering.
H.5. Training: None required.
H.6. Experience in the job offered: 36 months.
H.7. Alternate field of study: Business Administration or related field.
H.8. Is there an alternate combination of education and experience that is acceptable? Yes.
H.8-A. If Yes, specify the alternate level of education required: Other.
H.8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: Combination of education and experience in lieu of a Master's degree.
H.8-C. If applicable, indicate the number of years experience acceptable in question 8: 4 years.
H.9. Is a foreign educational equivalent acceptable? Yes.
H.10. Is experience in an alternate occupation acceptable? No.
H.14. Specific skills or other requirements:
Applicant must have a combination of education and experience equivalent to a Master's degree in Industrial Engineering, Business Administration, or a related field, with strong statistical background and analytical skills and a minimum of three years of experience in the financial industry. Excellent writing and communication skills are also necessary. (The three years of experience in the financial industry is a necessity of the business to ensure sufficient exposure to the financial services industry to enable the applicant to perform the required duties effectively. This experience may have been gained either as a part of the degree equivalency or separately.) (The 4 years of experience in Block H.8-C reduces to 2 years for a Bachelor's degree holder in any of the specified fields).

As set forth in the labor certification in this case, an individual can qualify for the offered position based on a Master's degree (or foreign equivalent degree) in Industrial Engineering, Business Administration, or a related field, *or based on a combination of education and experience equivalent to a Master's degree*. The experience associated with the alternate education is only four years, less than the Bachelor's and five years of progressive experience allowed by regulation in lieu of a Master's degree. Question H.14 further reduces the allowed experience to two years if the candidate has a Bachelor's degree, which is similarly less than a Bachelor's degree and five years of progressive experience. The labor certification also does not specify what combination of education and experience is required to establish the Master's degree equivalency. Specifically, it does not require that a single degree Bachelor's degree (or foreign degree equivalent), followed by five years of progressive experience, be the minimum education requirement to establish the Master's degree equivalency through a combination of education and experience. 8 C.F.R. § 204.5(k)(2) specifically provides that a "United States *baccalaureate degree or a foreign equivalent* degree followed by at

least five years of progressive experience in the specialty *shall be considered the equivalent of a master's degree*." (Emphasis added).

Where the labor certification allows for a Bachelor's degree (followed by five years of progressive experience) for qualification as an advanced degree professional, the degree must be a single U.S. bachelor's (or foreign equivalent) degree. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the legacy INS responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990) and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[5] In order to have experience and

[5] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional holding an advanced degree must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree, in addition to the five plus years of progressive experience in the specialty. Here, as noted, the labor certification's alternate education and experience requirements do not require an individual to possess a minimum of a Bachelor's degree in combination with the requisite five years of progressive experience in establishing a Master's degree equivalency.

Therefore, since an individual can qualify for the offered position with a degree less than a baccalaureate (followed by five years of progressive experience in the specialty), the petition does not qualify for advanced degree professional classification.

Counsel for petitioner contends that the director's decision reflects the conflicting standards for establishing a Master's degree equivalency that are applied by DOL and United States Citizenship and Immigration Services (USCIS), which he asserts adversely and unfairly impacts the petition in this case. Specifically, counsel states that while 8 C.F.R. § 204.5(k)(2) indicates that a Bachelor's degree plus five years of employment experience is the equivalent of a Master's degree, such a combination of education and experience would exceed the DOL's Specific Vocational Preparation (SVP) level of 7 for the offered position, resulting in a potential denial of the labor certification by DOL.

Counsel contends that under the DOL approach, a Bachelor's degree is equal to two years of SVP (SVP level 7) and a Master's degree is equal to four years of SVP (SVP level 7). Thus, a Bachelor's degree plus two years of experience equates to a Master's degree under this application. Counsel asserts that indicating alternate requirements, such as a Bachelor's degree plus five years of experience (SVP level 8) required by USCIS for advanced degree classification, would exceed the DOL SVP level[6] for the offered position.[7]

In the first instance, the AAO may not ignore the regulatory requirements of 8 C.F.R. § 204.5(k)(2), which provide that a "United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." Here, as per the terms of the labor certification, the actual minimum requirements of the offered position are a "combination of education and experience equivalent to a Master's degree." *See* Question H.14 and H.8-B. The petitioner's response in question H.14 of the ETA Form 9089 suggests that the Master's degree equivalency may be satisfied by Bachelor's degree holders with only two years of experience, which conflicts with 8 C.F.R. § 204.5(k)(2). The labor certification also does not require that the Master's equivalency in question H.8-B. be satisfied with a minimum of an actual Bachelor's *degree* (or foreign degree equivalent), in combination with five years of progressive experience. Thus, the offered position does not qualify for classification as a member of the professions holding an advanced degree.

Counsel further contends that USCIS should disregard the petitioner's response to question H.8-C, which states that the petitioner would accept four years of experience as part of the alternate combination of education and experience that it indicated was acceptable in question H.8. Even if the AAO were to disregard the petitioner's response to question H.8-C, the minimum qualifications for the offered position as set forth in the labor certification would still allow for an unstated combination of education and experience equivalent to a Master's degree equivalency, and, as indicated in question H.14, would allow for only two years of experience if combined with a Bachelor's degree. As the labor certification does not specify that the Master's degree equivalency requires a minimum of a Bachelor's degree (in combination with five years of progressive experience), the offered position would not qualify for classification as a member of the professions holding an advanced degree.

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[6] Counsel's contention here fails. The requirements set forth in the instant labor certification already exceed the DOL SVP of 7 of the offered position, as the primary requirements are stated as Master's degree (= 4), and three years of experience in the position offered, totaling seven years and an SVP of 8. Likewise, requiring a Bachelor's degree (= 2) and five years of experience would result in the same (= 7 years total, SVP 8).

[7] Counsel cites to Board of Alien Labor Certification Appeals (BALCA) decisions on brief, relating to appeals of denials of labor certifications by the DOL. However, such decisions are not binding on USCIS or the AAO and are not applicable to the specific issue here. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel also asserts on appeal that the director erred in applying 8 C.F.R. § 204.5(k)(4) to invalidate the labor certification in this case. Counsel is mistaken in his conclusion. The record shows that USCIS did not invalidate the labor certification, but, rather, denied the petition because the *minimum* qualifications for the offered position set forth in the labor certification was not a Master's degree (or foreign degree equivalent) or a Master's degree equivalency based on a single Bachelor's degree plus five years of progressive experience in the specialty. Thus, the labor certification does not support the petition seeking classification for the offered position as a member of the professions holding an advanced degree under section 203(b)(2) of the Act.

There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different preference classification once the director has rendered a decision. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

In summary, the offered position does not require an advanced degree. Therefore, the petition cannot be approved for a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The director's decision denying the petition is affirmed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Thus, beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the August 21, 2011 priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

Based on the primary requirements, the labor certification in this case requires a Master's degree and a minimum of three years of work experience in the offered position to qualify for the proffered position. The beneficiary claims on the ETA Form 9089 to have gained this experience while employed with [redacted] in a full-time capacity from October 1, 2005 to March 31, 2009. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter, dated January 18, 2011,

from , CEO of , indicating that the beneficiary was employed in the offered position from September 2005 to March 2009. The letter does not indicate whether the beneficiary's employment was in a full-time or part-time capacity. In addition, the name of the employer differs from the name indicated on the labor certification. The AAO also observes that the prior employer's street address and suite number are identical to the petitioner's. Furthermore, the employer, used this address on the letterhead in its January 2011, at which time it appears that the petitioner, which was incorporated in April 2010, was simultaneously using the same address. It is incumbent upon the petitioner to resolve any such inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988). The record before the AAO does not contain independent objective evidence, such as the beneficiary's IRS W-2 or Misc-1099 Forms issued by the former employer, to resolve the discrepancy in name, verify the full-time employment, and demonstrate that the beneficiary satisfied the minimum qualifications for the offered position as of the priority date, if relying on a Master's degree, or two years of full-time experience based on a Bachelor's degree.[8] In any future filings, the petitioner must submit such evidence.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. The motion will be granted and the petition reopened. However, the AAO's decision of February 1, 2013 is affirmed, and the underlying petition remains denied.

**ORDER**: The motion is granted; the previous decision of the AAO dismissing the appeal, dated February 1, 2013, is affirmed, and the underlying petition remains denied.

[8] Additionally, the record does not contain a copy of the beneficiary's Bachelor's degree, but instead only contains a certificate to his selection to the "Industrial Engineering Honor Society." Nothing in the record demonstrates that the beneficiary has either a Master's degree or a Bachelor's degree.